

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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SIMON & FLYNN, INC.,

Plaintiff-Appellant.

-against-

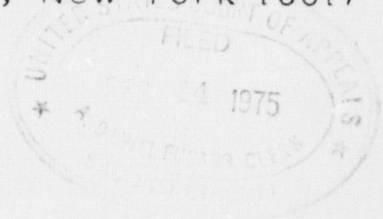
TIME INCORPORATED, TIME INCORPORATED
BOOK CLUBS, NEW YORK GRAPHIC SOCIETY,
LTD. WALLYN, INC., SPORTS ILLUSTRATED
BOOK CLUB, COMMITMENT PRODUCTIONS,
INC., AMERICAN EXPRESS, CHARLES SCRIB-
NER'S SONS, DOUBLEDAY & COMPANY, INC.,
GEORGE L. FLYNN, JAMES J. WALSH,
"JOHN DOE" and "RICHARD ROE",

Defendants-Appellees.

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PLAINTIFF APPELLANT'S REPLY BRIEF
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VICTOR ROGER RUBIN
of Counsel



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AMERICAN EXPRESS, CHARLES SCRIBNER'S
SONS, DOUBLEDAY & COMPANY, INC., GEORGE
L. FLYNN, JAMES J. WALSH, "JOHN DOE" and
"RICHARD ROE", the names "JOHN DOE" and
"RICHARD ROE", being fictitious, the parties
intended being the distributors of the book entitled,
VINCE LOMBARDI ON FOOTBALL,

Defendants-Appellees.
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The brief of the appellant clearly demonstrated that the Court below committed error in that the complaint provided jurisdiction in the Federal Courts on five (5) grounds:

- A. The infringement of the work Vince Lombardi On Football and the derivative infringement of the work Vince Lombardi's Science and Art of Football.
- B. The efforts made by appellant to register Vince Lombardi's Science and Art of Football and the questionable status of that registration.

C) The fact that the above film was, in fact, registered under the facts alleged in the complaint, and under the saving clause.

D) That appellant was the equitable owner of the copyright of VINCE LOMBARDI OF FOOTBALL and alleged sufficient facts of infringement to sustain Federal Court jurisdiction.

E) That in all events, the Court should have given appellant leave to replead.

It should be noted at the outset that respondent, TIME-LIFE, is the only respondent having interposed a Memorandum of Law in opposition to Appellant's brief. As will be demonstrated infra, the position of the equitable owner as against respondent, TIME INC. and defendant FLYNN'S group are completely different. It would appear, however, that only TIME INC. seeks to challenge the issue herein.

THERE IS DERIVATIVE INFRINGEMENT
OF THE ORIGINAL WORK, A MAN NAMED LOMBARDI

Paragraphs Nineteenth and Twenty Fifth of the complaint (App. p.p. 9 & 10) clearly allege a derivative infringement.

"That based on the same science materials used to produce the afore-said work entitled "A MAN NAMED LOMBARDI," plaintiff also produced... "VINCE LOMBARDI'S, THE SCIENCE and ART of FOOTBALL" (Para 19th, p. 9).

(Describing VINCE LOMBARDI ON FOOTBALL"... which describes the material to be contained in said book referred to substantially the same material and was based on substantially the same material as comprised the plaintiff's proprietary work entitled "VINCE LOMBARDI'S - THE SCIENCE and ART of FOOTBALL." (Paragraph Twenty Fifth - page 10).

Unquestionably, therefore, infringement is alleged in the complaint. The liberal rules of pleading in the Federal Courts, permit no other interpretation.

The quotation from NIMMER THE LAW OF COPYRIGHT, cited by respondent on page 9 of its Reply Brief appears to be an out of context minority view. In the same section 42 NIMMER continues that the better view appears to be that where copied material was derived from an underlying work which was, in fact, copyrighted, the copyrighted work will be considered to have been infringed upon, and this, without regard as to whether the defendant copied from the underlying work directly or indirectly "via the derivative work." NIMMER goes on to state that this is a specialized application of what must be considered a general principal, to wit: That

to copy from a work copied from a copyrighted work is no less an infringement than if the work had been directly copied. NIMMER ON COPYRIGHTS, § 42, Page 174, 1974.

Clearly, therefore, in the instant case, the allegations fall within the accepted rules of establishing derivative infringement.

B) THE ALLEGATIONS OF REGISTRATION OF "VINCE LOMBARDI'S - THE SCIENCE AND ART OF FOOTBALL HAVING BEEN PLEADED AS TRUTHFULLY AS WITHIN THE PLAINTIFF'S KNOWLEDGE, WERE ADEQUATE TO GIVE THE COURT JURISDICTION.

It has been established that because depositions were denied to the appellant, appellant was constrained to rely on its severely limited knowledge in pleading allegations of registration of VINCE LOMBARDI - THE SCIENCE AND ART OF FOOTBALL. The actions of defendant FLYNN'S alleged conspiracy with the other respondents served to limit the knowledge of appellant.

The pleader alleged acts constituting registration (Paragraph 21st and 22nd App. p. 9), but out of necessity could not truthfully assert with total definite-

ness that such registration occurred. However, the subsequent allegations in the complaint as a whole, were adequate to establish factual circumstances for which a copyright could have been established after a full disclosure from the culprit, which disclosure was prevented.

A mere review of the records of the register of copyrights would be insufficient to determine the efficacy of a possible copyright, as all or portions of the work could have been registered under names unknown to the appellant. It is a matter of record that defendant FLYNN sought to register each of the 12 episodes separately. How, then, is appellant to know under which name or names the episodes were, in fact, registered. The denial of discovery, therefore, forced the pleader to draw its complaint with what information it had.

THE WORK VINCE LOMBARDI - THE SCIENCE
AND ART OF FOOTBALL COULD BE PROTECTED UNDER
THE SAVING CLAUSE.

The defendant, FLYNN and/or his agents, servants and/or employees are in possession of the film and appellant is unaware if the requisite copyright symbol was, in fact, added to the film to bring it within the Saving Clause, which is designed to prevent harsh con-

sequences for inadvertent error.

The denial of depositions when taken, together with the dismissal of the complaint, prevents more detailed and truthful pleading on the subject.

IN ANY EVENT, THE EXISTENCE OF EQUITABLE OWNERSHIP OF THE INFRINGED WORK GAVE THE FEDERAL COURT JURISDICTION.

It is clear that as against defendant, Flynn, and his group, the appellant had a right to show equitable ownership.

The owner of the equitable title is not a mere licensee and he may sue in equity particularly where the owner of the legal title is an infringer or one of the infringers, thus occupying a position hostile to the plaintiff.

Ted Browne Music Co. v. Fowler, 290 F.751 (at p. 753)

The complaint alleges that defendants, Time Inc., knew or should have known of plaintiff's equitable ownership of the work,

Vince Lombardi On Football.

That upon information and belief, the defendants, Time Incorporated, Time Inc. Book Clubs, and New York Graphic Society Ltd., knew or should have known of the proprietary right, title and interest and the copyright interest of the plaintiff in and to the literary work and materials comprising a book entitled, Vince Lombardi On Football (para. 34th App.p.12)

Clearly, where there is equitable ownership, the fact that contracts were entered into by respondent, Time Inc., without the permission and license of the equitable owner ipso facto creates an infringement of the work, Vince Lombardi on Football . The infringement of the equitably

owned work immediately brings the within matter within the case of Harrington v. Mure, 186 Fed.Supp.655, giving the Federal Court jurisdiction under all the conceivable circumstances set forth by said case.

To have circumvented the infringement, respondent Time Inc., would have had to have dealt directly with appellant and receive its permission to proceed.

IN ANY EVENT APPELLANT SHOULD HAVE HAD
THE RIGHT TO REPLEAD.

Clearly, the law will not permit a repleading when the facts are so clear that no new cause of action could be spelled out. The exact contrary situation exists here.

No finding of fact is made that the work, Vince Lombardi's -
The Science and Art of Football is not derivative;

No finding of fact was made that the work was not properly registered or would not have fallen within the Saving Clause;

Even respondent, Time Inc., concedes the rights of the equitable owner (reply Brief, p.11), but no factual determination was made as to the status of Time, Inc., as an infringer.

What was established by the Court below was its complete failure to consider derivative or equitable copyright. The inartistic drawing of the complaint is not as material as the substance of that complaint.

What was clearly established by the Court below was its complete failure to consider the fact that an effort by appellant's employee to register the derivative work was frustrated by what appeared to be the employee's inartistic efforts, but after the conspiracy to conceal the true ownership of the works, the former employee of the appellant suddenly develops the art necessary to obtain a colorable copyright.

The Court below further failed to consider the allegation in paragraph 36th of the complaint alleging the status of employees Flynn, Walsh and Wallynn, Inc., with respondent, Time Inc. as employer binding the respondents with the knowledge carried by their employees.

The culprits now seek to use the alleged lack of knowledge of the deceived party as justification for the dismissal of the claim. They would deny to appellant the disclosure devices readily available to other litigants and force appellant to plead with limited knowledge and hence, apparently in an inarticulate manner. The appellant must be permitted to re-plead.

Respectfully submitted,

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New York, N.Y. 10017

VICTOR ROGER RUBIN
of Counsel

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

Joyce E. Wilson, being duly sworn, deposes and
says:

That your deponent is not a party to the action,
is over the age of 18 years of age and resides at New York,
New York.

That on February 14, 1975, deponent served the
within Reply Brief upon Cravath, Swaine & Moore, attorneys
for defendant-appellee Time Inc., Time Inc. Book Clubs, New
York Graphic Society, Ltd., and Charles Scribners Sons,
at One Chase Manhattan Plaza, New York, New York 10005, the
address designated by said attorneys for that purpose by
depositing a true copy of same enclosed in a post-paid
properly addressed wrapper in a post office under the exclusive
care and custody of the United States Postal Service within the
State of New York.

Sworn to before me this
14th day of February, 1975

Rose Ann Herman
ROSE ANN HERMAN
Notary Public, State of New York
No. 31-4601157
Qualified in New York County
Commission Expires March 30, 1976

Joyce E. Wilson
JOYCE E. WILSON